No. 15798

United States Court of Appeals

For the Ninth Circuit

CLYDE PHILP, *Appellant*,

vs.

SAM MACRI, PAULINE MACRI, JOSEPH MACRI, ELEANOR MACRI, DON R. MACRI, KATHLEEN N. MACRI, HERMAN HOWE and VIOLA B. HOWE, *Appellees*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEES

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BRIEF OF APPELLEES

SUMMARY OF ARGUMENT FOR APPELLEES

1. The order dismissing plaintiff's complaint was proper and should be affirmed for the reason that the complaint violates Rule 8(a) (2) of the Federal Rules of Civil Procedure.

2. The order dismissing the first cause of action was proper and should be affirmed for the following reasons:

(a) Appellant, being a resident of Peru, is not entitled to a decree enjoining legal proceedings against him in his own country.

(b) Appellant seeks protection of a court of equity without offering to do equity.

(c) Appellant can obtain any relief to which he may be entitled in the courts of Peru, which are courts of general jurisdiction.

3. The order dismissing the third cause of action was proper and should be affirmed, because it fails to to state a claim upon which relief can be granted.

ARGUMENT FOR APPELLEES

1. The Complaint Violates Rule 8 Federal Rules of Civil Procedure.

The complaint in this case contains fifteen pages; and the first cause of action, alone, contains twenty-three numbered paragraphs. It is replete with argument, conclusions, and extraneous matter, and clearly violates the rule requiring pleadings to contain a short and plain statement of the pleader's claim in simple, concise and direct averments.

In *McCann vs. Clark*, 191 F. (2d) 476 (1951) (certiorari denied, 72 S. Ct. 112; 342 U.S. 872; 96 L. Ed. 656)., the court said:

> "The pleading in the case before us does not contain a short and plain statement of the claim, and its averments are neither simple, concise nor direct. It is so flagrantly violating of Rule 8 that it should have been dismissed on that ground, if on no other."

In *Condol vs. Baltimore and O. R. Co.*, 199 F. (2d) 400 (1952), it was said:

> "The District Court would have been justified in dismissing the complaint for failure to comply with subsections (a) and (e) (1), of Rule 8 of the Federal Rules of Civil Procedure, which re-

quires a pleading to contain a short and plain statement of the pleader's claim in simple, concise and direct averments."

While the District Court did not base the dismissal of the complaint in this case upon the fact that it violated Rule 8, Federal Rules of Civil Procedure, it did point out that the complaint was violative of that rule (Tr. 33), and that it required "careful study for elimination of conclusion of law and other extraneous matter." Even if the grounds upon which the complaint was dismissed were not sustainable, the order dismissing the action should nevertheless be affirmed. As stated in 3 *Am. Jur.*, *Appeal and Error*, § 1008.

> "A decision right in result will not be reversed even though the reason for it is wrong."

and in § 1163 of the same authority:

> "A judgment below will be affirmed, even though based upon a ground insufficient to warrant it, if another ground exists which is sufficient, for it is the general rule that a decision of a trial court which is correct as a matter of law will be affirmed, even though the trial court arrived at its conclusions by an erroneous process of reasoning. A judgment will be affirmed if, in point of law, it should be affirmed."

The same rule is stated in 5 *C.J.S.*, *Appeal and Error*, § 1849, as follows:

> "Where there is any ground upon which the action of the lower court may be sustained, the judgment may be affirmed, although the ground or reason assigned for the action of the court may not be sustainable."

2. Order Dismissing First Cause of Action Was Proper.

(a) Appellant Is Not Entitled to Decree Enjoining Legal Proceedings Against Him in Peru.

In his first cause of action, the appellant seeks a decree of the United States District Court enjoining the appellees from proceeding in the courts of Peru to enforce certain judgments obtained against him.

The complaint of the appellant alleges that he is a resident of Lima, Peru, and seeks to restrain the appellees from proceeding with the suit they have instituted against him in Peru, on the ground that no accounting has been made between the parties in connection with certain contracts or joint ventures in which they were formerly engaged.

It seems apparent that, in view of the fact that the suit against appellant has been brought in Peru, the country of his residence, and the only jurisdiction where process could be served upon him or in which judgments against him could be rendered effective, the granting of an injunction against the maintaining of legal proceedings in Peru would be to effectually prevent the appellees from obtaining any relief whatever.

Many jurisdictions, even when sufficient grounds for an injunction actually exist, will not grant an injunction against maintaining legal proceedings in an-

other state unless the parties both reside in the state where the injunction is sought. *American Exp. Co. vs. Fox*, 135 Tenn. 489, 187 S.W. 1117, Ann. Cas. 1918B 1148; *Folkes vs. Central of Georgia R. Co.*, 202 Ala. 376, 80 S. 458; *Hartford Accident & Indemnity Co. v. Bernblum*, 122 Conn. 583, 191 A. 542. In the latter case, in discussing the rights of courts of one state to enjoin the prosecution of an action in another, the court said:

> "One of the most usual grounds for such action is the fact that the party enjoined has sought by resort to the courts of another jurisdiction to deprive a *fellow citizen* of some benefit which should rightfully be accorded him under the law of the state of their *common residence* . . .
>
> "In other words, underlying the cases in which relief by injunction has been granted is the fact that the proper forum for the determination of the rights and liabilities of the parties is *the state of their common residence.*" (Italics ours.)

The foregoing quotation from the *Hartford* case is set out in *Wehrane vs. Peyton*, 134 Conn. 486, 58 A. (2d) 698, 6 A.L.R. (2d) 887, in which the court said:

> "Implied in these statements and inherent in the ground upon which such relief is granted is a limitation, ordinarily applicable, that *courts will act only to protect one who is domiciled in the state where the injunction is sought.*" (Italics ours.)

Even if it be conceded that, in a proper case, a resident of a foreign state might be granted an injunction, the power of the court to grant such an

injunction "should be exercised sparingly, and only where a clear equity is presented requiring the interposition of the court to prevent manifest wrong and injustice." 43 *C.J.S., Injunctions*, § 49. In 28 *Am. Jur., Injunctions*, § 207, it is said:

> "The question as to when a court of equity will exercise jurisdiction to restrain parties from prosecuting proceedings in other states is one of great delicacy, owing to the fact that it may frequently lead to a conflict of jurisdiction. On general principles, and on grounds of comity, the power is sparingly and reluctantly exercised, and the relief is not granted except for grave reasons and under very special circumstances."

If a resident of a foreign country could succeed in obtaining from the courts of this country an injunction against the bringing and maintaining of legal proceedings against him in the country where he resides, on the ground that he claimed to have a defense to the action, residents of the United States would be almost powerless to enforce their rights against absconding debtors or other persons who had removed from this country. They would first have to institute legal proceedings in the foreign country, at great disadvantage and considerable expense, because jurisdiction of the non-resident could be obtained in no other way. Then, if an injunction were granted by the courts of the United States against the maintenance of the suit in a foreign country until such time as an accounting as to the profits or losses from partnerships or joint ventures between the parties had been ob-

tained, the residents of the United States, at considerable additional disadvantage and expense, would be compelled to resort to the courts of the foreign country to obtain a decree settling the accounts between the parties, because jurisdiction of the non-resident could be obtained in no other way. And even if the courts of the United States, in some way, could obtain jurisdiction and enter a decree settling the accounts, it would still be necessary for the residents of this country to bring proceedings in the courts of the foreign country to try to enforce the judgment entered by the courts of the United States, for they would have no other way of obtaining jurisdiction over any property or property rights of the non-resident.

In the brief of appellant, pages 11 to 14, inclusive, appellant points out that the complaint merely alleges that an action against him was commenced in the Supreme Court of Peru, and that there is no allegation as to the course of the action or as to the status of the pleadings in Peru. The statement contained in the memorandum decision (Tr. 33) to the effect that plaintiff has actively appeared in and thus far unsuccessfully contested the Peruvian lawsuit was based upon a statement contained in the memorandum of authorities submitted by the appellees and quoted on page 12 of the brief of appellant, and upon oral statements made to the court at the time of the argument of the motion to dismiss. However, the present

status of the legal proceedings in Peru is entirely immaterial, and it is not important whether they have been pending for some time or whether they have only recently been commenced. The important thing is that the Peruvian courts have jurisdiction of the parties and of the litigation pending in Peru, and that jurisdiction should not be interfered with under the circumstances by the courts of this country.

(b) Appellant Seeks Protection of Court of Equity Without Offering To Do Equity.

The appellant in this case seeks equitable relief, without offering to do equity. His sole purpose is to prevent the appellees from carrying on the suit which they have instituted in the only country where the appellant could be found, and while he alleges that there has been no accounting made by the defendants in connection with contracts between the parties, he does not seek an accounting in this action, nor offer to secure the payment in this jurisdiction of such an amount as an accounting might show that he owes to the appellees. His sole and only prayer is that the court restrain the appellees from proceeding with the suit against him in the jurisdiction of his domicile.

It is true that, at page 5 of the brief of appellant, he states that he "submits himself to the equitable jurisdiction of the court for all purposes, including a declaration, if warranted, of liability in such amount as the court might find." However, he makes no offer to

secure the payment of such amount as the court might find, and does not even offer to pay such amount as the court may find to be owing.

As we have pointed out, it would be necessary for the appellees to resort to the courts of Peru to attempt to enforce any judgment that the court may make in this action, and as a condition precedent to obtaining equitable relief, the appellant, at the very least, should offer to give security to guarantee that the decision and judgment of the court will be complied with by him.

(c) Any Relief to Which Appellant May Be Entitled Can Be Obtained by Him in the Courts of Peru.

The courts of Peru are courts of general jurisdiction. The appellees have invoked the jurisdiction of the Peruvian courts, for the reason that that is the only way in which they could obtain any relief against appellant; and, as the court, in the case at bar, stated in his memorandum decision and order (Tr. 33):

> "Due to voluntary residence in Peru, as alleged in the complaint, plaintiff is subject to the jurisdiction of the courts of that country."

We have not overlooked the fact that the complaint of the plaintiff (Tr. 10) *alleges* that in the courts of Peru, appellant cannot show that the judgment sued upon is owned by a partner and joint venturer and arises out of a joint venture or partnership in which there has been no acounting. This allegation

of the complaint is a pure conclusion of law, and no facts are alleged to substantiate it. As is stated in 31 *C.J.S., Evidence*, § 21:

> "The courts do not take judicial notice of either the written or unwritten laws of a foreign country."

In 20 *Am. Jur., Evidence*, § 46, the rule is stated as follows:

> "A court takes judicial notice only of the law prevailing in its jurisdiction; judicial notice will not be taken of foreign laws, whether written or unwritten, except to the extent that our courts take judicial notice of the common law of England. Foreign laws will not be noticed by either the state or federal courts unless pleaded and proved."

The Uniform Judicial Notice of Foreign Laws Act, which was adopted by the State of Washington in 1941, expressly provides:

> "The law of any jurisdiction other than a state, territory or other jurisdiction of the United States shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice." (R.C.W. 5.24.050)

The appellant. having established his residence in Peru, and having compelled the appellees to resort to the courts of that country in order to obtain any redress against him, cannot complain that the appellees have proceeded to do so. They are at a much greater disadvantage than he is, and any relief to which he is entitled could be obtain by him in the courts of his own country.

3. THE THIRD CAUSE OF ACTION DOES NOT STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

In the third cause of action set out in the complaint of appellant (Tr. 19, 20), he alleges that the defendants have slandered him by circulating in financial circles in Lima, Peru, "the erroneous story that defendants would sue and did sue plaintiff because he did not pay his share of a joint venture and partnership." The complaint carefully avoids the naming of any persons to whom communications were alleged to be made, the contents of any such alleged communications, or the persons who are alleged to have made such communications. It is so indefinite that neither the court nor the defendants could possibly ascertain from it when, by whom, or to whom the alleged communications were made, or what the alleged communications consisted of.

In 53 *C.J.S., Libel and Slander*, § 164, at page 255, it is said:

> "As a general rule, the complaint must set out the particular defamatory words as published, . . . and a statement of their substance and effect or meaning is generally held insufficient."

and in 33 *Am. Jur., Libel and Slander*, § 237, the rule is stated as follows:

> "The complaint or other pleading must contain allegations sufficient to show that the statement or matter complained of is defamatory as to the plaintiff. While some courts have held that libel or slander complained of may be set out in sub-

> stance and effect, the great weight of authority supports the view that in the absence of any statutory provision to the contrary, it must be reproduced verbatim, not only in order to enable the court to determine whether it is in fact defamatory, but also to apprise the defendant of the exact charge that he will be called upon to answer."

The allegations of the first and second causes of action have been made a part of the appellant's third cause of action, by reference, even though the second cause of action has been dismissed, and no assignment of error with respect to the dismissal thereof is made by the appellant (Tr. 5). It seems apparent, therefore, that the only communications the appellant relies upon as having been made by the appellees consist of the statements made in the pleadings and other documents relative to the suit brought by the appellees in the Peruvian courts against appellant. If this be so, the statements made by appellees in connection with the suits are absolutely privileged, and form no basis for a cause of action for slander against them.

In 53 *C.J.S.*, *Libel and Slander*, § 104d (1), at page 104, it is said:

> "Defamatory matter contained in pleadings filed according to law in a court having jurisdiction, if relevant and pertinent to the issues in the case, is absolutely privileged; and it is immaterial that the allegations are false and malicious or are made recklessly and without probable cause and under cover and pretense of a wrongful or groundless suit. This rule is based on sound public policy, and is adopted because it would be a discourage-

ment to litigants, and defeat justice, if they were to be subjected to prosecutions for allegations in pleadings filed therein."

It is well established by the decisions of the Supreme Court of the State of Washington, that all charges and allegations contained in pleadings addressed to and filed in a court of competent jurisdiction, which are pertinent and material to the relief sought, whether legally sufficient or not, are absolutely privileged. *Abbott vs. National Bank of Commerce*, 20 Wash. 552, 56 Pac. 376; *McClure vs. Stretch*, 20 Wn. (2d) 460, 147 P. (2d) 935; *Miller vs. Gust*, 71 Wash. 139, 127 Pac. 845; *Johnston vs. Schlarb*, 7 Wn. (2d) 528, 110 P. (2d) 190, 134 A.L.R. 474.

It seems clear that the third cause of action set out in appellant's complaint, which contains nothing except general and indefinite statements and conclusions, fails to state any cause of action upon which relief can be granted, and that the order of the District Court in dismissing it should be affirmed.

Respectfully submitted,

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